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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RYAN Q. CLARIDGE,

Plaintiff,

v.

I-FLOW CORPORATION; a Delaware corporation; I-FLOW, LLC, a Delaware limited liability company; DJO LLC (f.k.a. DJ ORTHOPEDICS, LLC), a Delaware limited liability company; DJO, INCORPORATED, aka DJO, INC., a Delaware corporation; STRYKER CORPORATION, a Michigan corporation; and STRYKER SALES CORPORATION, a Michigan corporation.

Defendants.

CASE NO.: 2:18-CV-01654-GMN-PAL

DEFENDANT I-FLOW'S MOTION TO STRIKE AND DISMISS PORTIONS OF PLAINTIFF'S COMPLAINT

I-Flow Corporation ("I-Flow"), through counsel, states as follows in support of its Rule 12(b)(6) Motion to Dismiss Plaintiff's Complaint:

INTRODUCTION

On August 30, 2018, Plaintiff Ryan Claridge filed suit against Defendant I-Flow seeking recovery for personal injuries allegedly relating to August 2005 and January 2006 shoulder surgeries. Plaintiff contends that his shoulder cartilage was damaged by the continuous infusion of local anesthetic administered following each surgery via infusion pumps manufactured by I-Flow and by Defendant Stryker Corporation, respectively. (Compl., ¶¶ 32–34). In particular,

Plaintiff alleges that an FDA-cleared Class-II medical device, prescribed and used by his surgeon in both instances, caused a condition called "chondrolysis."[1] Plaintiff alleges that in the spring of 2018—more than twelve years after his surgeries—he learned for the first time that he had chondrolysis of his left shoulder joint and that his chondrolysis was caused by the post-operative use of the infusion pumps inserted by his surgeon in 2005 and 2006." (Dkt. #2 ¶ 35).

Plaintiff's complaint sounds in strict products liability (Count I), negligence (Count II), warranty (Counts IV and V), and fraud (Count VI)[2]. Plaintiff has agreed, in discussions with defense counsel, to voluntarily dismiss Count III, which alleged breach of express warranty. I-Flow waived service of process and, pursuant to agreed extensions of time, has timely filed the instant motion addressing Counts IV, V and VI. Plaintiff's punitive damages claim is premised upon allegations of "off-label" marketing of the ON-Q® PainBuster,® an FDA-cleared medical device allegedly manufactured by I-Flow.[3]

As discussed in more detail, below, Plaintiff's claims for breach of warranty, and misrepresentation and fraudulent concealment, and prayer for punitive damages are insufficiently pled. Therefore, those counts must be stricken.

MEMORANDUM OF POINTS AND AUTHORITIES

Counts IV, V and VI of Plaintiff's complaint, along with plaintiff's prayer for punitive damages, must be dismissed because they fail to pass muster under the pleading requirements of the federal rules. Federal pleading requirements state that a plaintiff's complaint must include

[1] Chondrolysis is characterized as the rapid and global destruction of articular cartilage, leading to complete deterioration of cartilage within 12 to 18 months.

[2] Plaintiff has agreed to dismiss Count III (Breach of Express Warranty) as to Defendant I-Flow.

[3] Continuous infusion therapy devices like the ON-Q PainBuster allow for post-operative delivery of local anesthetics through a soaker catheter surgically placed within the operative site. The continuous infusion of local anesthetic medication provides local pain relief directly at the incision site without the side effects of narcotics. The PainBuster is sold empty, with no pre-filled medications. It is the treating physician's decision whether to prescribe such a device and the manner in which it is to be used.

"only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)); *see also* FED. R. CIV. P. 8(a)(2). A District Court must dismiss a complaint for insufficiency if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp.,* 633 F.2d 757, 759 (9th Cir. 1980). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citations omitted). As discussed in detail, below, Plaintiff's Complaint fails to satisfy this standard.

A Rule 12(b)(6) motion arguing a failure to state a claim is properly based on one of two arguments – either plaintiff has failed to state a cognizable legal theory, or plaintiff has failed to allege sufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir. 1984). Of course, before ruling on a motion to dismiss, the court is to consider, as true, all allegations of material fact, and those facts must be construed in the light most favorable to the non-moving party. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754 (9th Cir. 1994). However, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.,* 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1952 (2009)). In other words, the complaint must contain enough factual content "to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly,* 550 U.S. at 556.

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I. PLAINTIFF'S IMPLIED WARRANTY CLAIMS ARE INSUFFICIENTLY PLED.

Plaintiff's warranty claims fail as a matter of law. Nevada Revised Statute ("N.R.S.") § 104.2314 provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." N.R.S. § 104.2314. Nevada law further states that goods to be merchantable must be at least such as: "(1) pass without objection in the trade under the contract description, (2) in the case of fungible goods, are of fair average quality within the description, (3) are fit for the ordinary purposes for which such goods are used, (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved, (5) are adequately contained, packaged and labeled as the agreement may require, and (6) conform to the promises or affirmations of fact made on the container or label if any." *Id.*

Nevada Revised Statute ("N.R.S.") § 104.2315 provides that "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is. . .an implied warranty that the goods shall be fit for such purpose." N.R.S. § 104.2315.

Additionally, Plaintiff's claim for breach of implied warranty cannot be maintained due to the lack of privity with I-Flow. A claim of implied warranty requires contractual privity between the buyer and seller. *Finnerty v. Howmedica Osteonics Corp.,* No. 214CV00114GMNGWF, 2016 WL 4744130, at *7 (D. Nev. Sept. 12, 2016) (dismissing breach of implied warranty claims against a manufacturer of a surgical knee replacement product for lack of privity); see also *Gillson v. City of Sparks*, No. 03:06-CV-00325-LRH-RAM, 2007 WL 839252, at *5 (D. Nev. Mar. 19, 2007) ("[A] claim for breach of implied warranty cannot be maintained in the absence of privity.");

Long v. Flanigan Warehouse Co., 382 P.2d 399, 402 (Nev. 1963).[4]

Plaintiff's Complaint fails to allege how any purported implied warranty was broken pertaining to the sale of the continuous infusion pump. Thus, Plaintiff's implied warranty claims fail to satisfy the requirements of Rule 8. Plaintiff cannot ignore the requirements of Nevada law.

II. PLAINTIFF'S FRAUDULENT CONCEALMENT CLAIM DOES NOT SATISFY RULE 9(B).

Rule 9(b) of the Federal Rules of Civil Procedure creates a heightened pleading requirement in cases alleging fraud or mistake, requiring that "the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule." *Vess v Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003), *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 796 (9th Cir. 1996) (applying Rule 9(b) to pleading of state-law cause of action).

Rule 9(b) demands that the circumstances constituting the alleged fraud "be 'specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009) (*citing Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Kearns*, 567 F.3d at 1124 (*citing Vess*, 317 F.3d at 1106). "A party alleging fraud must 'set forth more than the neutral facts necessary to identify the transaction.'"

[4] In their Motion to Dismiss and Strike Portions of the Complaint, co-Defendant Stryker Corporation also includes a lack of privity argument. I-Flow adopts Stryker Corporation's argument in full.

Kearns, 567 F.3d at 1124 (*citing In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994)).

Instead of stating the time, place, and content of the misrepresentations allegedly made by I-Flow, or the manner in which Plaintiff was purportedly misled, Plaintiff simply makes vague, general and neutral allegations. The Complaint contains none of the "who, what, when, or where" that Rule 9(b) mandates. Instead Plaintiff simply states that all Defendants "caused. . . misrepresentations to be made about their pain pumps intentionally, recklessly, and without regard for the truth." (Dkt. 1, ¶ 74). Plaintiff further alleges in conclusory fashion that I-Flow "intentionally or negligently did not alter or correct the disseminated information they knew to be misrepresentations or omissions" of its pain pump but does not identify to which information he is referring. (Dkt. 1, ¶ 80). Moreover, Plaintiff plainly asserts reliance without providing any detail as to *how* he relied upon the alleged concealment. (Dkt. 1, ¶ 81). As courts have recognized in other pain pump litigation, this fails to meet Rule 9(b)'s standard. *See Adams*, 2010 WL 1339948 (finding that the plaintiffs "impermissibly lump together their allegations against all defendants...[a]nd fail to set forth any facts concerning the "who, what, when, where, and how" with respect to the alleged fraud and misrepresentations."); *Gilmore*, 663 F. Supp. 2d at 860; *Sherman*, 2009 WL 2241664 at *5; *Rash v. Stryker Corp.,* 589 F. Supp. 2d. 733 (W.D. Va. 2008) (dismissing allegations of false representations in pain pump case because the allegations "fail to state when or where these representations were made or who made them. In short, the plaintiff has not revealed the particular circumstances of the alleged fraud.")

Plaintiff's complaint is insufficient because it fails to allege the "specific statements about the products in question or any statements that any of them were actually heard and relied upon," *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. CV 08-1967, 2009 WL 3762972 at *5 (W.D. Mo. Nov. 9, 2009). In addition, plaintiff has failed to

specifically identify the necessary circumstances of the alleged fraudulent concealment, including the "time, place and contents" of the alleged misrepresentations. *Id.* at *3. Because Plaintiff's fraudulent concealment claim fails to comply with the requirements of Rule 9(b), it should be dismissed.

III. PLAINTIFF FAILS TO PLEAD NEGLIGENT MISREPRESENTATION WITH THE LEVEL OF SPECIFICITY REQUIRED.

Fraud actions are generally disfavored and must be pled with particularity. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107-1108 (9th Cir. 2003). The particularity requirement applies equally to claims for negligent misrepresentation. *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101 (C.D. Cal. 2003). Rule 9(b), "requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations," and "the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Odom v. Microsoft Corp.*, 486 F.3d 541, 553-554 (9th Cir. 2007).

Here, Plaintiff's negligent misrepresentation allegations fail because Plaintiff has failed to plead that claim with sufficient specificity, and Plaintiff's claim does not identify "how, when, where, to whom and by what means" the alleged representations were made. Plaintiff generally claims the unspecified negligent misrepresentations were made to Plaintiff, his physician, hospital and medical providers. (Dkt. 1, ¶¶ 73). Plaintiff goes on to broadly describe the misrepresentations, his reliance on the misrepresentations and his harm. (*See generally* Dkt. 1, ¶¶ 78-81). However, Plaintiff completely fails to reveal how those representations were made, when they were made, where they were made and by what means they were made.

Plaintiff's vague approach to pleading is also not enough to meet the standards of Rule 8 as elucidated in *Twombly* and *Iqbal*. Pursuant to Federal Rule 8(a)(2), a pleading must contain a

short and plain statement of the claim showing that the pleader is entitled to relief. While Rule 8(a)(2) does not require detailed factual support for the allegations asserted, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009).

> A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not shown that the pleader is entitled to relief," and thus fails to satisfy Fed. R. Civ. P. 8(a)(2) and is appropriately disposed of through a motion to dismiss. *Id.* at 1950.

Here, Plaintiff's failure to identify "how, when, where, to whom and by what means" the alleged representations were made fails to state a plausible claim under the federal pleading standard as interpreted by *Twombly* and *Iqbal*. *See Dittman v. DJO, LLC*, No. 08-cv-02791,

2009 WL 3246128 (D. Colo. Oct. 5 2009) (facts amounting to a "mere possibility" are "not adequate to state a claim under the prevailing standards set forth by *Twombly* and *Iqbal*."); *Sherman v. Stryker*, No. SACV 09-224, 2009 WL 2241664 (C.D. Cal. March 30, 2009) (a complaint failing to specify critical facts, such as the defendants or the types of medications, is insufficient under *Twombly* and *Iqbal*). Plaintiff's claim for negligent misrepresentation is completely void of any factual specificity and, therefore, must be dismissed.

IV. PLAINTIFF FAILS TO PLEAD AND CANNOT PROPERLY PLEAD A CLAIM FOR RECOVERY OF PUNITIVE DAMAGES.

a. PLEADINGS STANDARD APPLICABLE TO A REQUEST FOR PUNITIVE DAMAGES RELIEF.

Under Rule 8 of the Federal Rule of Civil Procedure, a plaintiff's complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Supreme Court explained, this means that a plaintiff must set forth in her complaint "enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This standard "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Rather, a plaintiff must make specific allegations which, if true, would raise a claim of entitlement to relief – "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In the wake of the Supreme Court's decisions in *Twombly* and *Iqbal,* the Tenth Circuit explained that to withstand a Rule 12(b)(6) motion, the complaint must "contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Bixler v. Foster,* 596 F.3d 751, 765 (10th Cir. 2010) (citing *Iqbal* and *Twombly*). "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." *Id.* (affirming motion to dismiss for failure to state a claim with sufficient particularity).

A plaintiff is required to plead the specific grounds for the relief sought beyond a mere recitation of legal conclusions. As the U.S. Supreme Court has stated:

> While a complaint attacked by a motion to dismiss for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions. A formulaic recitation of the elements of a cause of action will not suffice. Factual allegations must be sufficient to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Id. at 555 – 56 (internal citations and quotations omitted). At the pleading stage, a plaintiff must state allegations which plausibly suggest, and are not merely consistent with, "the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 557 (quoting FED. R. CIV. P. 8(a)(2)).

These pleading standards, which require a complaint to set forth facts sufficient to "permit the court to infer more than the mere possibility of misconduct," *Iqbal*, 129 S. Ct. at 1950, fully apply to claims of punitive damages. The Third Circuit recently affirmed the dismissal of a punitive damages claim relying on the pleading standard of *Iqbal*, because "there [wa]s simply no foundation in the complaint for a demand of punitive damages." *Boring v. Google Inc., No.* 09-2350, 2010 WL 318281, at *7 (3d Cir. Jan. 28, 2010) (unpublished).

Courts from around the country have agreed with the Third Circuit and have dismissed punitive damages claims where, as here, such claims were "pled in purely conclusory and

formulaic ways." *See N'jie v. Cheung*, No. 09-919 (SRC), 2009 WL 2151901, at *4 (D.N.J. July 14, 2009) (citing *Twombly* and dismissing claims for punitive damages where "[p]laintiffs have not alleged sufficient facts to make plausible claims for . . . punitive damages"); *Wheeler v. Hruza*, No. CIV 08-4087, 2010 WL 2231959, at *3 (D.S.D. June 2, 2010) (citing *Twombly*, dismissing claim for punitive damages, and holding that the "Amended Complaint does not contain sufficient factual matter, which if accepted as true, states a 'claim to relief [for punitive damages]' that is plausible on its face"); *Stanley v. Star Transport, Inc.*, No. 1:10CV00010, 2010 WL 2079731, at *1 (W.D. Va. May 22, 2010) (citing *Iqbal* and dismissing claim for punitive damages "for which no specific facts are alleged other than a 'formulaic recitation of the elements' of the claims"); *316, Inc. v. Maryland Casualty Co.*, 625 F. Supp. 2d 1179, 1182 (N.D. Fla. 2008) (citing *Twombly* and dismissing claim for punitive damages because "the amended complaint fails to contain enough factual matter (taken as true even if doubtful in fact) to establish a 'plausible,' as opposed to merely a 'possible' or 'speculative,' entitlement to punitive damages").

b. PLAINTIFF'S PUNITIVE DAMAGES CLAIM FAILS TO MEET THE FEDERAL PLEADING STANDARD AND SHOULD BE DISMISSED.

Here, Plaintiff utterly fails to state a claim for punitive damages under the federal pleading requirements. Cast in only generalities, devoid of any specific allegation related to I-Flow, Plaintiff alleges, *inter alia*:

///

- Defendants represented to the public and to health-care professionals that the pain pump was a safe and effective product used for post-operative pain management. . . (Dkt. #2, ¶ 12).

- Defendants knew that their pain pumps were not cleared by the United States Food and Drug Administration ("FDA") for use in the joint space. In fact, Defendants knew that the FDA, as early as 1999, had repeatedly rejected their requests for permission to market

these devices for orthopedic use and/or use in the joint space, based on a lack of safety data. (Dkt. #2, ¶ 14).

- Defendants actively promoted their pain pumps to orthopedic surgeons for orthopedic use and/or use in the joint space, despite the FDA's denial of permission to market the device for these indications, and despite Defendants' failure to test the safety of their pain pumps for joint space use. (Dkt. #2 ¶ 16).

Plaintiff continues to allege that his surgeon justifiably relied upon misrepresentations to his detriment, but never identifies any such misrepresentation or describes how it was justifiably relied upon. (Dkt. #2, ¶ 17-18).

These general allegations are entirely insufficient to state a claim and deprive I-Flow of reasonable notice of the grounds for Plaintiff's claim. Plaintiff fails to detail any acts or omissions on the part of I-Flow or its agents, but rather, makes general allegations regarding "pain pump" manufacturers as the basis for her punitive damages claim. He fails to identify any "representations made by [I-Flow] sales representatives," or the manner in which I-Flow allegedly encouraged Plaintiff's surgeon to use its device in a "dangerous manner." Moreover, after more than a decade of nationwide "pain pump" litigation—much involving the same attorneys of record here—Plaintiff fails to attach to his complaint, or to even describe the content of any catheter placement guide, ad, or presentation that endorsed or even suggested the intra-articular use of I-Flow's infusion device. The reason is simple and obvious: no such evidence exists.

Plaintiff's pleading utterly fails to place I-Flow on notice as to what statements it made or deliberately failed to make that could possibly be the basis for the award of punitive damages. Plaintiff's claim is therefore subject to dismissal, under the controlling authority of *Twombly and Iqbal. See also e.g., 316, Inc. v. Maryland Casualty Co.*, 625 F. Supp. 2d 1179, 1182 (N.D. Fla. 2008) (dismissing punitive damages claim where "the amended complaint fail[ed] to contain

enough factual matter . . . to establish a 'plausible,' as opposed to merely a 'possible' or 'speculative,' entitlement to punitive damages").

c. PLAINTIFF FAILS TO PLEAD THE NECESSARY ELEMENTS FOR AN AWARD OF PUNITIVE DAMAGES UNDER NEVADA LAW.

It is well settled that courts in this district do not recognize punitive damages as a legitimate basis for an independent cause of action. *E.g. See*, *Volungis v. Liberty Muutal Fire Ins. Co.*, No. 2:17-CV-2247 JCM (VCF) 2018 WL 3543030, at *6; *Rowe v. Clark County School Dist.*, No. 2:16-cv-661-JCM-PAL, 2017 WL 2945718, at *3 (D. Nev. July 10, 2017); *Garcia v. Nevada Property 1, LLC*, No. 2:14-cv-1707-JCM-GWF, 2015 WL 67019, at *4 (D. Nev. Jan. 6, 2015). In *Garcia*, the Court explained that punitive damages are a remedy that the Court may impose upon a finding of liability. *Garcia*, 2015 WL 67019, at *4.

Plaintiff's tort claims are governed by Nevada state law. The Erie-doctrine establishes that federal courts sitting in diversity must apply the relevant state's substantive law to state law claims. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938); *In re County of Orange,* 784 F.3d 520, 527, 531-532 (9th Cir. 2015). Because this Court's jurisdiction is based on diversity, and because it is undisputed that all relevant events in this matter took place in Nevada, this Court must look to the tort law of Nevada to assess Plaintiff's claim for damages. *See Id.*

Under Nevada's choice of law rules, the laws of the jurisdiction with the most significant relationship control the substantive rights of the parties. *General Motors Corp. v. Eighth Judicial Dist. Court of State of Nev. Ex rel. County of Clark,* 134 P.3d 111, 116-117 (2006); *Contreras v. American Family Mutual Insurance Company,* 135 F. Supp. 3d 1208, 1219 (D. Nev. 2015). Here, the central events giving rise to Plaintiff's claim allegedly occurred within the state of Nevada. Therefore, Nevada has the most significant relationship to this action and the substantive law of the state of Nevada controls.

Under Nevada tort law, for an award of punitive damages, Plaintiff must establish "clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied." N.R.S. 42.005(1); *see also Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 252-253 (2008). Nevada law defines "oppression" as despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person. N.R.S. 42.005. "Fraud" is defined as an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person. *Id.* Nevada defines "malice (express or implied)" as conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others. *Id.* Lastly, Nevada defines "conscious disregard" as the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences. *Id.*

In order to justify punitive damages, the defendant's conduct must have exceeded "mere recklessness or gross negligence." *Thitchener*, 192 P.3d at 255. Simple negligence, on the other hand, will not sustain an award of punitive damages. They "are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Restatement (Second) of Torts § 908 comment b at 465 (1979).

Here, Plaintiff has failed to plead any facts that could meet Nevada's standard for an award of punitive damages. Plaintiff's claims relate to alleged generically described conduct on the part of "pain pump manufacturers" as a group, and not to any specific conduct of I-Flow. These allegations fail to adequately set forth specific actions taken by I-Flow that amounted to oppressive, fraudulent or malicious conduct. Even accepting all facts pled as true, the conduct described would constitute, at most, ordinary negligence. Plaintiff's complaint sounds in negligence, product liability and warranty, not in fraud or intentional tort, and it describes no

specific negligent conduct of I-Flow that in any way implies an oppressive, fraudulent or malicious state of mind. Plaintiff's complaint, therefore, is facially inconsistent with, and belies his claim for punitive damages. Plaintiff has failed to place I-Flow on reasonable notice as to the bases of his punitive damages claim and has offered no factual allegation or policy consideration that could justify an award of punitive damages under Nevada law. Therefore, Plaintiff's claim is subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

V. CONCLUSION

Wherefore, I-Flow Corporation requests that this court enter an order dismissing Counts IV, V and VI and Plaintiff's claim for punitive damages from Plaintiff's Complaint with prejudice and with costs, and providing for any other just relief.

Respectfully submitted,

DATED: December 7, 2018

BROWN, BONN & FRIEDMAN, LLP

By: _____

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CERTIFICATE OF SERVICE

I certify that I am an employee of BROWN, BONN & FRIEDMAN, LLP, and that on December 7, 2018, I caused a true and correct copy of the foregoing document described as:

DEFENDANT I-FLOW'S MOTION TO STRIKE AND DISMISS PORTIONS OF PLAINTIFF'S COMPLAINT

to be served on all parties as follows:

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☒ **VIA CM/ECF ELECTRONIC FILING NOTIFICATION** where specified on the attached service list.

Executed on December 7, 2018, at Las Vegas, Nevada.

Adam Noyce
An employee of BROWN, BONN & FRIEDMAN, LLP